Why is NFIB and NFIB Legal Center So Concerned About the Federal Government's Clean Water Act Land-Grab?

$37,500 Per Day in Penalties for a CWA Violation

Not too long ago, NFIB Small Business Legal Center came to the defense of an ordinary Idaho couple facing serious heat from the Environmental Protection Agency (EPA). Mike and Chantell Sackett were looking at ruinous fines for allegedly violating the Clean Water Act. We're talking shock-and-awe tactics here.

EPA was threatening to impose $37,500 per day in fines because the Agency believed the Sacketts had illegally filled a wetland when they began laying the foundation for their dream home. But that didn't make any sense to the Sacketts because their property wasn't wet in the least, and was entirely surrounded by other developments. Until EPA came knocking they had no idea that their property might potentially be considered a "wetland" under the CWA.

The Scope and Reach of the CWA is Notoriously Unclear

Of course, there is a lot of room for lawyers to argue over whether any given property falls within EPA's jurisdiction. To be sure, the jurisdictional reach of the CWA is notoriously unclear. But that hasn't stopped the EPA and the Army Corps of Engineers from making untenable assertions of jurisdiction, as in the Sackett case. Even crazier, EPA wasn't even going to let the Sacketts dispute its jurisdiction—but was instead insisting that they needed to restore their property to its natural state at great expense, or face an additional $37,500 per day in fines. So that would have been $75,000 in daily fines for the Sacketts—all because they began building on a dry section of their property, without realizing that they were stepping into an environmental minefield.

The Mere Assertion of Jurisdiction is usually a Death Knell for Development Plans

The Sacketts had to fight all the way to the Supreme Court just to secure their right to have a day in court to dispute EPA's assertion of CWA jurisdiction. And now they are embroiled in an protracted legal battle over whether in fact their property is—or is not—a jurisdictional wetland for the purposes of the CWA. If it is, then they are facing monstrous liabilities for illegally filling-in a wetland. If it isn't, then EPA has—once more—overstepped in manner that has surely caused terrible stress, anxiety and grief to the Sackett family.

Luckily the Sacketts have found pro bono counsel, at Pacific Legal Foundation, to help with their legal battle. But most folks facing a potentially ruinous EPA enforcement action would have no choice but to settle because of the astronomical costs of litigating a full-blown jurisdictional case with the federal government. Indeed, the legal costs alone are enough to burry most small business owners and ordinary individuals—even when the Agency is truly in the wrong.

And when you factor in the reality that a jurisdictional battle is always going to be a crapshoot—because folks of reasonable intelligence often disagree on the reach of the CWA—it shouldn't be surprising that most people feel that they have no choice but to capitulate to the Agency's demands when EPA or Army Corp assert jurisdiction. That means giving up on any hope of ever developing on that portion of your property—or for that

matter making any economically beneficial use at all. Of course, if you make a mistake and begin using a portion of your land that the Agency later says is a wetland, you are usually left with little choice but to pay a big-time settlement to avoid an even more devastating enforcement action. In practical terms, this means that the Agencies can literally scare small business owners, and ordinary landowners into leaving their property in a natural undeveloped state—a result that the environmental crusaders encourage.

An Assertion of Jurisdiction Greatly Devalues Private Property

Suffice it to say, it's a big deal if the government asserts that your property contains wetlands because that means you can't do anything with your land—at least not with the portion covered by the CWA. Theoretically you could apply for a permit in some cases. But those permits are exceedingly difficult to obtain, and exorbitantly expensive. As of 2006 the average permit cost the applicant over $270,000. So for these reasons, the mere assertion that a portion of your property is covered by the CWA means an immediate—and serious—depreciation in value.

This is why NFIB and NFIB Small Business Legal Center take CWA issues so seriously. We know that small business owners invest substantial resources when acquiring real property. For many businesses your property is essential for your operations. So we know how difficult it is if government tells you that a portion of your land is essentially off-limits. And we know that, if you have tied up tremendous resources in your land, it's a serious financial blow when government regulation depreciates the value of your property.

EPA and Army Corps Say the Proposed Regulation Will Not Hurt Small Business?

As detailed in Monday's post, EPA and Army Corps are currently in the process of finalizing a new regulation that will radically expand CWA jurisdiction. We're calling this a massive regulatory land-grab because the Agencies will make it effectively impossible for many landowners to use portions of their land that were never previously considered "jurisdictional wetlands." In other words, your private properly will become—essentially —nature preserve.

Amazingly EPA and Army Corp are claiming that this regulatory land-grab will have no adverse impact on the small business community. Without being hyperbolic, we can say that is definitively not true because—as explained earlier—whenever the Agencies assert CWA jurisdiction, private property values are seriously depreciated. And of course in so radically asserting jurisdiction, the Agencies will only be imposing financial hardships on businesses, and discouraging economic development. So it is not clear how the Agencies can even make this assertion with a straight face.

Their claim is that, in radically expanding CWA jurisdiction, they're actually helping small business by bringing regulatory predictability. And of course it is true that small business generally appreciates predictability. But one cannot claim to be giving a benefit to small business by resolving every issue in favor of federal regulatory powers, and against the right of business owners to make reasonable uses of their own property. That line of argument is a classic subterfuge. Simply put, the federal CWA land-grab is going to hurt small business and the Agencies know it.

Boiling-Down the Federal Government's Clean Water Act Land-Grab

NFIB and NFIB Small Business Legal Center are currently in the process of preparing comments, which we will soon submit to the Environmental Protection Agency (EPA) and the Army Corps of Engineers, voicing small business concerns and legal objections to newly proposed Clean Water Act (CWA) regulations that we believe amount to a massive regulatory land-grab. This is a hot button issue because EPA and Army Corps are seeking to expand their regulatory powers in a manner that will severely impact many landowners throughout the country—including many small business owners. This hits closest to home for ranchers, farmers, and anyone making intensive use of their property—especially folks in the construction industry. But, the truth is that it is going to affect any business with real estate that might potentially be said to contain wetlands under the new regulations.

For this reason NFIB and NFIB Legal Center are taking the proposed CWA regulations very seriously. As always, we are standing up to the federal government on behalf of the little guy. Here is a quick recap of what the CWA is and how the federal government is working to expand its jurisdiction beyond what Congress intended, and beyond what the Constitution will allow.

What is the CWA?

The CWA is a federal law that is designed to protect the integrity of our nation's waters by eliminating pollutant discharges into the "waters of the United States." While this is certainly a laudable goal, it is enforced with rather draconian measures ($37,500 per day fines). The CWA doesn't just prohibit companies from dumping toxins into the water. It's much more comprehensive than that. The CWA prohibits any sort of filling, or dredging of "wetlands." This means that its essentially impossible—at least without a costly permit—to make economically beneficial uses of a lands covered by the CWA. But, the beef is usually in figuring out what is—and is not—a jurisdictional wetland.

CWA Jurisdiction is a Difficult Issue

EPA and Army Corps have long been bothered by the fact that it is sometimes difficult for them to prove CWA jurisdiction. This is because the CWA's reach is always a murky question. We know that Congress gave the Agencies the power to regulate "waters of the united states." But that's a pretty vague charge. Not surprisingly, the Agencies have long tried to interpret this to mean that they have the authority to regulate anything and everything wet—conceivably even a mud-puddle. But the Supreme Court has repeatedly rebuffed the Agencies for making overly aggressive assertions of jurisdiction.

Most recently in 2006 the Supreme Court held that EPA had over-reached in asserting CWA jurisdiction over any water that "migratory birds" might visit. The Court reaffirmed that the Constitution places limits on the Agency's jurisdictional reach, such that jurisdictional wetlands must bear a close connection, or nexus, to "traditional navigable waters." This means that the Agencies must prove that a regulated wetland is connected to a stream or river that could in fact be used for commercial purposes. Of course the further we get away from conventional water bodies (bays, sounds, lakes, rivers, streams, etc.), the more murky things get. At what point is a marsh or mudflat going to be considered a wetland? At what point will we consider a mere indentation in

the ground—that occasionally has water overflow—a jurisdictional wetland?

These are very difficult questions. They are so difficult that the Supreme Court could not agree on how to draw the line. In fact the Supreme Court's decision in *Rapanos v. United States* was so divided that the Court gave us two different tests. This left everyone scratching their head, as it seemingly made a complicated issue more confusing than ever.

Expanding the Reach of the CWA

In response EPA and Army Corps released a guidance document in 2008, which aimed to help the Agencies figure out when to assert CWA jurisdiction under the *Rapanos* tests. But, under President Obama, the EPA and Army Corp. have taken a more aggressive stance on these jurisdictional issues. The Agencies are apparently frustrated by how difficult and fact intensive it is to prove jurisdiction under the *Rapanos* tests. So they have been looking for ways to make it easier to assert jurisdiction over lands that have very tenuous connections—if any—to commercially navigable waters.

First in 2012 the Agencies proposed a new guidance document that would have expanded CWA jurisdiction to include any land over which water occasionally flows that feeds into any watershed. The result would have been a radical regulatory land-grab. But the Agencies changed course, concluding that it would be more effective to promulgate an official regulation. And so now EPA and Army Corps have proposed a regulation that will do the same thing. By their own admission, the new regulation will expand CWA jurisdiction by at least three percent. But, given that the Agencies are now asserting jurisdiction over entire watersheds, we think that's a very low-ball estimation. To be sure, EPA will now be asserting CWA jurisdiction over more than a million square miles of land—or 41% of the lower 48 states—in the Mississippi watershed alone.

If this is an issue of concern to you, we recommend that you continue following the NFIB Blog for further updates. Also, you can follow NFIB Legal Center on Facebook for the most current updates. And if you are a NFIB member specifically concerned that the new regulations will affect you, we invite you to contact us.

About Luke Wake

Luke A. Wake is a senior staff attorney at the NFIB Small Business Legal Center. Wake has particular expertise on environmental and land use issues, and has worked on numerous other constitutional issues and matters of importance to small business owners. He is an ardent defender of private property rights, which he believes are essential to the free enterprise system and the foundation of American liberty. As a strong advocate of individual rights and economic liberties, he has built his career defending small business interests. Since joining the NFIB Legal Center, Wake has focused on a whole host of issues, from employment law matters to regulatory compliance. In addition to serving as a resource for small business owners, Wake remains committed to the Legal Center's pledge to ensure that the voice of small business is heard in the nation's courts.